Mailed 3/01/2000

In the Matter of:		
Esther Ohayon, Widow of Yuda Ohayon Claimant		
v.		
Jacksonville Shipyards, Inc. Employer		
and	Case Nos.:	1999-LHC-2113 2000-LHC-625
National Union Fire Ins. Co. c/o Seaboard Surety Co. Aetna Casualty & Surety Carriers	OWCP No.:	6-178590
and		
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest		

APPEARANCES:

David N. Neusner, Esq.
For the Claimant

Christopher Boyd, Esq.
For the Employer/Carrier

Robert E. Thomas, Esq.
For Aetna Casualty & Surety

Thomas A. Grooms, Esq.
J. Phillip Giannikas, Esq.
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on August 3, 1999 in Jacksonville, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, RX for a Carrier's exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 1	Attorney Thomas' letter requesting a ruling on his motion to dismiss Aetna Casualty as a respondent herein	07/27/99
DX 1	Director's letter filing	07/29/99
DX 2	Director's Response to Aetna's Motion for Summary Judgment	07/29/99
DX 3	Director's Motion for Order Granting a Continuance or, in the Alternative, Extending Time Within which to Submit Evidence	07/29/99
ALJ EX 1	This Court's **ORDER** relating to DX 3	07/30/99
DX 4	Director's letter filing	09/29/99
DX 5	Motion for Extension of Time	10/04/99
CX 18	Claimant's response	10/01/99
ALJ EX 22	This court's **ORDER GRANTING MOTION FOR CONTINUANCE** (i.e., time within which to file additional evidence)	10/04/99
DX 6	Director's letter filing **DIRECTOR'S INTERROGATORY**	10/06/99

DX 7	Director’s letter filing	10/08/99
DX 8	**Motion to Compel Immediate Production of Documents and Other Tangible Things and Renewed Motion for Extension of Time**	10/08/99
ALJ EX 23	This Court’s **ORDER** directing that Claimant file a response thereto	10/08/99
CX 19	Claimant’s response	10/11/99
DX 9	Director’s response thereto	10/12/99
ALJ EX 23A	This Court’s **ORDER** granting in part and denying in part the Director’s motion	10/12/99
DX 10	Director’s letter filing	10/12/99
DX 11	**Motion to Compel Immediate Production of Documents and Other Tangible Things and Renewed Motion for extension of Time**, as well as	10/12/99
DX 12	**Director’s Second Request for Production of Documents and Tangible Things,** as well as proposed	10/12/99
DX 13	**Order for Immediate Production by Claimant and Additional Extension of Time**	10/12/99
DX 14	Director’s letter again requesting certain medical records of the employee	10/12/99
CX 20	Claimant’s letter sending to counsel for the director “a complete set of medical records and x-rays (obtained) from Atty. Evan Yegelwel.”	10/12/99
ALJ EX 24	This Court’s letter sending to counsel for the Director the five (5) subpoenas he had requested	10/13/99
DX 15	Director’s letter filing	11/01/99

DX 16	**Director's Response to Motion for Protective Order**	11/01/99
DX 17	**Director's Renewed Motion for Order for Immediate Response to Discovery and For Production of Medical Evidence**	11/01/99
ALJ EX 25	This Court's **ORDER** relating to DX 16, DX 17	11/02/99
CX 21	Claimant's response	11/03/99
ALJ EX 26	This Court's **ORDER** granting Claimant additional time to assemble and send to counsel for the Director the pertinent medical records	11/05/99
CX 22	Claimant's letter sending to Director's counsel the employer's x-rays	11/24/99
CX 23	Claimant's letter filing the	12/06/99
CX 24	August 15, 1984 Marriage Certificate of Claimant and Decedent, as well as the	12/06/99
CX 25	November 18, 1999 Death Certificate of the Decedent, as well as the	12/06/99
CX 26	Form LS-18, dated November 23, 1999	12/06/99
CX 27	Claimant's letter advising that the widow's claim for Death Benefits has been filed and that Claimant would be "appointed personal representative of the estate of Mr. Ohayon	12/09/99
CX 28	Claimant's letter advising that various chest x-rays of the Decedent had been sent to the Director's counsel	12/10/99
ALJ EX 27	District Director Jeana F. La Rock's transmittal memorandum forwarding to the OALJ the	12/13/99
ALJ EX 28	Form LS-262, dated November 19, 1999	12/13/99

ALJ EX 29	This Court's **ORDER** advising the parties that the widow's claim had been docketed at the Boston District as 2000-LHC-625	12/22/99
CX 29	Claimant's letter requesting additional time to file evidence relating to the Widow's claim	12/27/99
CX 30	Claimant's letter filing the	12/27/99
CX 31	Decedent's funeral bill, as well as the following birth certificates	12/27/99
CX 32	Mickael Moche Ohayon (DOB 4/9/86)	12/27/99
CX 33	Simy Ohayon (DOB 12/3/80)	12/27/99
CX 34	Ilana Ohayon (DOB 4/18/78)	12/27/99
DX 18	Director's letter advising that the Director had no further evidence to offer herein	12/27/99
CX 35	Claimant's letter filing the	01/10/00
CX 36	December 22, 1999 report of Martin G. Cherniack, MD, MPH	01/10/00
DX 19	Director's letter filing	01/24/00
DX 20	**Director's Post-Hearing Submission** as well as	01/24/00
DX 21	Claimant's and Decedent's third-party suit against asbestos manufacturers	01/24/00
DX 22	Attorney Embry's November 3, 1999 letter to Michael Niss, Director, OWCP	01/24/00
DX 23	Attorney Embry's January 4, 2000 letter to Director Niss	01/24/00
CX 37	Attorney Olson's letter filing the	01/26/009

CX 38	January 20, 2000 Deposition Testimony of Esther Ohayon (“Claimant” herein)	01/26/00

The record was closed on January 10, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at all relevant times.

3. Claimant alleges that her husband suffered an injury on March 20, 1998 in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. No informal conference was held herein.

7. The applicable average weekly wage is in dispute.

8. The Employer and its Carrier have paid no benefits herein.

9. “St. Paul had bond coverage for the self-insured employer which expired on June 30, 1987" and CIGNA’S bond coverage for the period of time during which the Decedent was last exposed to asbestos, **i.e.** September of 1990, has been exhausted and there now may be no coverage under the Act for the Employer. (TR 14)

10. Counsel for the Director disputes that the last exposure to the injurious stimuli at the Employer’s shipyard occurred in September of 1990. (TR 15-19)

The unresolved issues in this proceeding are:

1. Whether Decedent’s lung cancer constitutes a work-related injury.

2. If so, the nature and extent of his disability.

3. Whether Decedent's death was due to his work-related injury.

4. Entitlement to interest on past due benefits, medical benefits and funeral expenses.

5. Responsible Carrier.

6. Whether the Special Fund is responsible for any benefits awarded herein if the Employer and/or Carrier are unable to pay the benefits awarded herein. (After the Employer went into bankruptcy proceedings, the Director OWCP, ordered the Employer to obtain a letter of credit. The initial amount was for $1.2 million and it has been drawn down to $959,045.13.) [TR 21-24])

Summary of the Evidence

Yuda Ohayon ("Decedent" herein),[1] who was fifty (50) years of age at his death, and who had a technical school education in steel construction for nine years in Israel and an employment history of manual labor, emigrated to the United States in 1975 and he went to work as a welder/burner at the Jacksonville, Florida shipyard of Jacksonville Shipyards, Inc. ("Employer"), a maritime facility adjacent to the navigable waters of the St. Johns River where the Employer built, repaired and overhauled vessels. As a welder/burner, Claimant "weld(ed) pipes, all kind of steam lines, main fuel lines," **i.e.**, whatever pipes and lines are needed to provide steam for the cargo ships, tankers, aircraft carriers, destroyers and cruisers. According to Decedent, "the commercial ships are done in the Bay yard (downtown)" and the U.S. Navy vessels "are done in the Navy Base" at Mayport, Florida. Decedent, who left the shipyard in 1990, shortly before the yard closed, personally worked with, was exposed to and inhaled asbestos dust and fibers, Decedent remarking that he directly handled asbestos blankets and that he used the blankets to wrap "sensitive material, like cables, electronic, and protecting them from burning or any kind of damage." (CX 13 at 3-9)

Decedent's cutting and installation of asbestos blankets caused asbestos to fly around the ambient air of the work environment, and the white dust would remain on his work clothes throughout the day. He also was exposed to asbestos dust and fibers as he worked in close proximity to the pipefitters who were cutting and installing asbestos as insulation around the pipes,

[1]Decedent was excused from attending the hearing in view of his rapidly deteriorating medical condition and as the parties preserved his testimony by deposition on March 30, 1999. (CX 13)

flanges and boilers, Decedent remarking, “And it was pretty dusty in the air when everybody (was) working the area.” Decedent worked primarily on vessel overhauls and this is especially dirty work as old asbestos insulation had to be ripped out and removed and replaced with other material. In his last few years at the shipyard, **i.e.**, the late 1980s, the Navy brought in “a special crew” to remove the asbestos from the vessels at the Navy base. Decedent worked around pipes all of his years at the shipyard and he was exposed to asbestos throughout his shipyard employment. As a youth Decedent smoked one or two cigarettes but he “(n)ever had a pack in (his) pocket.” After Decedent left the shipyard in September of 1990, he started his own business, an independent store, as a distributor of fishing tackle. The business is located in a warehouse in Jacksonville and he was not exposed to asbestos while doing that work. (CX 13 at 10-16)

Decedent was in pretty good health when he left the shipyard but within the last year or so there has been a change in his medical condition. He began experiencing the chills, coughing and spitting and cold spells early in 1977 and, after observing blood in his phlegm, in early 1998, he went to see his family doctor, Dr. Prince (CX 6), who diagnosed bronchitis. Decedent was referred to a specialist on Orange Park who wanted to hospitalize Decedent but he was refused admission because he had no health insurance and the hospital demanded cash payment up-front prior to admission. Instead he was treated as an outpatient and, on March 20, 1998, tissue samples were taken by bronchoscopy (CX 4) and, according to Decedent, “And they called us back and they said, become positive, you got cancer.” Dr. Miranda (CX 8) referred Decedent to Dr. Scot Ackerman, a specialist (CX 7), and Decedent received a course of chemotherapy. As the chemo was debilitating, it weakened him for three to seven days at a time and he did not know how he would feel from day to day. He had shortness of breath and coughing spells on a daily basis. (CX 13 at 16-22, 28-31)

Decedent was told he had broncho alveoli cancer or adenocarcinoma on March 20, 1998. He was not told by his doctors the etiology of his cancer because “(t)hey don’t confer with me very much” and “none of them want to talk.” (CX 13 at 26-28) Decedent had “absolutely” no health problems prior to 1997 and he had the bottom left lobe of his lung removed. The cancer could not be seen on Decedent’s CAT scans for the next six months but it was seen again in November of 1998. Decedent believed his asbestos exposure caused his lung cancer “because (he) never had any breathing problem, was in perfect physical condition” prior to 1977. He routinely worked fourteen (14) hour days and asbestos is the only hazardous material to which he has been exposed. Decedent was not exposed to asbestos or other chemicals while he lived in

Dimona, in the southern part of Israel. He had chemotherapy, navelbine, once a week and cobalt platinum once a month, a treatment which knocked him out and nauseated him for a week. The navelbine usually weakened him for a day or so. Decedent's lung cancer fluctuated between being stable and being active. He applied for Social Security Administration disability benefits but has not yet had a ruling on his application as of the time of the hearing. Decedent's maritime employment ended in September of 1990. (CX 13 at 31-39)

Dr. Martin G. Cherniack, Board-Certified in Internal and Occupational Medicine, reviewed Claimant's medical records and the doctor, in his April 25, 1999 letter to Claimant's attorney, states as follows (CX 1):

I am responding to your letter of April 13, 1999, regarding Mr. Yuda Ohayon and the etiology of his lung cancer. Specifically, you ask if his industrial exposures to asbestos at the Jacksonville Shipyard contributed to the development of his lung cancer. This is an unusual case for several reasons. First, it is distinctly uncommon for a man to present with primary adenocarcinorna of the lung below the age of 50, even in the setting of heavy smoking. Second, Mr. Ohayon had a negligible tobacco risk. Finally, he began employment in 1976, when asbestos was nearing its end as a material for new construction in American shipyards.

History of Present Illness

Mr. Ohayon's medical history is well summarized by the notes from Drs. Price and Antonio-Miranda and from the Orange Park Medical Center, Columbia Memorial Hospital, St. Vincent's Medical Center and University Medical Center in Jacksonville. Mr. Ohayon presented with pneumonia and atelectasis in August 1997 which was followed by hemoptysis and a large left lower lobe mass that did not resolve with antibiotic treatment. Previous chest x-rays in November 1995 and January 1996 with spirometry were essentially normal. He was referred to Dr. Miranda in March 1998 who raised the suspicion of primary lung cancer based on historic exposures to asbestos and welding fumes. A trans-bronchial biopsy performed in March 1998 was positive for a well differentiated adenocarcinoma. Left lower lung resection was performed one month later. The presence of a satellite lesion was a grim finding and raised the tumor status to T4. At the time of resection there was already a suggestion of metastases to the right lung. Negative CEA staining and positive mucocarminophilic were consistent with primary lung adenocarcinoma.

Subsequently, there was evidence by the summer of 1998 of substantial metastatic spread. There is no other significant

disease history.

Non-occupational Risk Factors

The most important non-occupational exposure for lung cancer is use of tobacco products. There is no known history of substantial pulmonary radiation, exposure to other pulmonary carcinogens such as chemotherapeutic agents, or inhalation of radon in high concentrations. Dr. Bluett defined Mr. Ohuda's (sic) smoking history as 5 pack years, ending at age 23. Dr. Miranda indicates the same stop date, describing no more than ½ pack per day prior to cessation. The accompanying notes indicate an even lower pattern of use.

Occupational Risk Factors

The primary occupational risk factor for lung cancer is exposure to asbestos. Various metal fumes, which may be encountered during welding, such as chrome and nickel, are potentially carcinogenic, but the risks have been modest and difficult to characterize in a working population.

By the provided history, Mr. Ohayon used asbestos blankets on a regular basis following his hiring at Jacksonville Shipyard as a welder in 1976. In the 1980s, through 1990 when he left the shipyard, there were extensive overhauls, which became more sporadic as the 1980s progressed. On the basis of this information, which is limited, he appeared to have a total of 15 years of exposure, about half of it moderately high grade and half of it moderately low grade.

Risk of Lung Cancer from Smoking

The diagnosis of lung cancer is a distinctly uncommon disease in a 49 year-old man, even when smoking has been intensive. The risk of lung cancer mortality for a man in this age group who has never smoked is approximately 4 per 100,000 (**J Natl. Cancer Inst** 85:457-464). This risk is doubled for a man who has smoked continuously into his 30s and then stopped at age 35. Even assuming the most extreme estimate (5 pack years, Mr. Ohuda's (sic) risk would have been elevated by approximately 25% to 5 per 100,000. These National Cancer Institute coefficients are for mortality not incidence. Raising the death rate by about 30% would give a reasonable estimate of the incidence rate. The introductory letter indicates that cigarette smoking was even more uncommon, being limited to a few cigarettes in childhood. From this vantage point, his attributable risk due to inhalation of tobacco products would range from 0-25% above background.

Risk of Lung Cancer from Asbestos

Asbestos related lung cancer risk can be estimated in several ways. One method is through categorical grouping or stratification into years of exposure. Another is to estimate risk based on presumptive inhalation of asbestos fiber concentrations. As an example of the first approach, Dement et al (**Am J Indus Med** 1983 4:421-433), examined exposure to chrysotile asbestos and found a significant rise in the standardized mortality ratio (SMR) for workers with 10-19 years of exposure. It was 288, or almost three times baseline. Hodgson and Jones looked at British shipyard workers, and found a critical escalation of risk after 10 years (1986).

Relative risk can also be predicted from those studies that have had accompanying environmental measurements and proposed to assess risk based on actual or presumed measurements. While such measured levels of asbestos fiber are not available for the Jacksonville Shipyard, there are mechanisms for predicting risk. This is usually done by predicting a relative risk for given level of asbestos fiber, multiplied by years of exposure.

In preparing the fiber/yr estimate, I have used the model presented by Huncharek (1984) and the MacDonalds (1986). There are two relevant insulation product fiber/year relative risk model estimates, those of Seidman (1984), which cites a fractional yearly increase of 0.050 f-y/ml and Selikoff (1979), which stipulates 0.010 f-y/ml. These are summarized by Nicholsen (1985) in order to develop K_1 coefficients for relative risk. I have assumed an intermediate value of K_1=0-025 f-y/cc, which is an average of the available studies for insulation workers. Estimates from the textile worker population, which also are based on substantial data, would put the risk somewhat lower at 0.01 - 0.02. Accordingly, I have elected to use a more conservative estimate of K_1=0.015. Without having actual exposure levels of asbestos taken from aboard surface ships during the period of Mr. Ohayon's employment, I have assumed a mean exposure level of 2.5 mppcf and 15 f/cc from 1976-1983 and 1.25 mppcf and 7.5 f/cc for 1983 1990. This reflects 50% and 25% of the ACGIH TLV recommended standard which preceded the more stringent recommendations of the late 1970s and 1980s. It is consistent with levels described by Hughes and Weill among textile workers.

This would suggest an elevated lung cancer mortality risk from asbestos exposure of 2.36. This is consistent with Dement's estimates that the SMR would be 352 for 9.1-36.5 mppcf x years. By his model, Mr. Ohayon would have been exposed to 26.5 mppcf x years.

Conclusion

Mr. Ohayon had probable exposures to asbestos sufficient to raise his lung cancer mortality risk to approximately 2.5 x background. For sake of proportionality, the asbestos related risk compared to the smoking risk is greater by a factor of 10-infinity. These are substantially evaluated attributable and relative risks.

It might be argued that although not specifically looked for, there was no evidence of pulmonary fibrosis or asbestosis on chest x-ray or CT scan. These findings are not, however a precondition for the attribution of lung cancer causation to asbestos.

Several studies of the relationship between asbestos exposure and lung cancer have described elevated risks of lung cancer either exclusively among workers with clinical asbestosis (Hughes and Weill 1981), or relatively more commonly in workers with asbestosis than in those without opacities on the x-ray (MacDonald and Macdonald 1986). Despite these observations, a recent paper by De Vos Irvine et al (1993) reflects the clearly mainstream position held by most investigators.

..... asbestos related neoplasms roughly linear dose-response curves are thought to exist with no threshold, suggesting that even very low or short term exposure to asbestos may cause lung cancer (all fibre types) or mesothelioma (crocidolite) without x ray evidence of pulmonary fibrosis.

This position has also been taken by United States regulatory agencies, particularly as they have attempted to extrapolate asbestos related health risks to the general population, based on industrial cohort exposures. The bases for this majority opinion are sound histo-pathological evidence and robust epidemiologic observation. More recent bio-assays have added additional and ultimately convincing proof that asbestos is a probable in vitro carcinogen.

In summary, asbestos is a substantial factor in the development of Mr. Ohayon's adenocarcinoma of the lung. In fact, it is the only extrinsic risk factor that can be identified by significant certainty.

The parties deposed Esther Ohayon (“Claimant”) on January 20, 2000 and the transcript of Claimant’s testimony is in evidence as CX 38. Claimant and Decedent had four children: Ilana Ohayon (DOB April 18, 1978), Simy Ohayon (December 3, 1980), Michael (April 9, 1986) and Orly Ohayon (October 13, 1996). According to Claimant, Ilana had been attending college at Ben Gurion University in Beer

Sheva, Israel and she returned to be with her parents in January of 1999 to help cope with her father's illness. Simy and Mickael are full-time students. Claimant met her future husband in 1971 and he was not smoking at that time and he did not purchase any cigarettes during their marriage. However, he smoked perhaps one or two cigarettes each week, cigarettes given to him by his friends. (CX 38 at 4-30)

Decedent enjoyed good health until he contacted pneumonia and it was during that hospitalization that his cancer was detected. Claimant and Decedent both passed their physical examinations in Florida to become naturalized citizens, and those records are in the possession of the INS. She is aware that a claim has been filed on her husband's belief against the manufacturers and distributors of asbestos but she has not been involved in any settlement discussions with reference to that claim. (CX 38 at 30-43)

The Director's post-hearing submission filed on January 24, 2000 (DX 20), reflects that the Employer is in Chapter 11 reorganization proceedings, that the Longshore insurance covering the applicable period of the Decedent's employment has been exhausted and that the Employer has secured Letter of Credit. According to the Director, "Should benefits be awarded, it will be determined by the Director, in accordance with statutory directive, if payment should occur and, if so, from what source: The Letter of Credit or the Special Fund. The Director's obligation to make payment is indirect derivative and ultimately discretionary." The Director does point out Section 18 "makes specific provision for the procedure to be followed in such a circumstance. This statutory provision requires a default by the Employer to first occur 'for a period of thirty days after compensation is due and payable.' 33U.S.C. §918(a)." (DX 20)

Director's counsel also points out that Claimant and Decedent have filed claims against the manufacturers and distributors of asbestos (DX 21) and that four of these claims have been settled for the gross amount of $221,000.00 and that Claimant has received the net amount of $128,470.95, after deductions for litigation expenses and the attorneys' fees. (DX 22, DX 23)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in

this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant

need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer and the Director contend that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Decedent's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Respondents' general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his

employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to them to rebut the presumption with substantial evidence which establishes that Decedent's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3D 1051(9th cir. 1998), 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his adeno-carcinoma, resulted from working conditions or resulted from his exposure to and inhalation of asbestos at the Employer's facility. The Employer and Carrier have introduced no evidence severing the connection between such harm and Decedent's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295

(1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Decedent's daily exposure to and inhalation of asbestos dust and fibers as a maritime employee at the Employer's shipyard directly resulted in the development of a lung cancer medically diagnosed and certified as bronchoalvelor cell carcinoma (CX 25), that the diagnosis and etiology thereof as stated by Dr. Cherniack (CX 1, CX 36) are uncontradicted in this closed record, that the Employer and Carrier had timely notice thereof, that the Employer, Carrier and the Director have consistently treated Decedent's pulmonary condition as non-work-related and that Decedent timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and the extent of Decedent's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of her husband's disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that her husband could return to any work on and after February 1, 1999. The burden thus rests upon the Respondents to demonstrate the existence of suitable alternate employment in the area. If the Respondents do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Respondents did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Decedent had a total disability on and after February 1, 1999.

Decedent's injury had become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed**

Shipbuilding Co., 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman**

Construction Corp., 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Decedent’s broncho alveolar cell carcinoma was, in my judgment, such a condition as it did not respond to aggressive therapy, rapidly deteriorated and Decedent passed away on November 18, 1999.

On the basis of the totality of the record, I find and conclude that Decedent was permanently and totally disabled from February 1, 1999 according to the well-reasoned opinion of Dr. Cherniack (CX 1) and as he was forced to discontinue working as a result of his occupational disease and such disability continued until his death on November 18, 1999.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's

average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Decedent worked at his retail store for the 52 week period prior to February 1, 1999 but the record does not reflect those wages. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel &**

Shipbuilding Co. v. Bonner, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

Decedent's income tax return for the year 1998 (CX 14) shows that he earned $26,221.00 during his last full year of work prior to the onset of disability, thereby producing an average weekly wage of $504.25, pursuant to Section 10(c) of the Act, and I so find and conclude.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BABS 219, 22 (1988); **Barber v. Woodward & Lothrop, Inc.**, 16 BABS 300 (1984). Entitlement to medical services is never time-barred where a

disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BABS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BABS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BABS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BABS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BABS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BABS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BABS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BABS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BABS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BABS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BABS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BABS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BABS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BABS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BABS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's

report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BABS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BABS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BABS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Decedent advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer and its Carriers did not accept the claim and did not authorize such medical care. Thus, any failure by Decedent to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, Claimant as the representative of Decedent's estate, is entitled to an award of benefits for such reasonable and necessary medical and treatment in the diagnosis, evaluation and palliative treatment of Decedent's bronchoalveola cell carcinoma between February 1, 1999 (TR 28) and November 18, 1999.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. Spence v. Terminal Shipping Co., 7 BABS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BABS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BABS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BABS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BABS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BABS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BABS 600 (1977). Section

9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BABS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BABS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BABS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BABS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BABS 250 (1986), aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc., 850 F.2d 283 21 BABS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BABS 954 (1979), **aff'g** 567 F.2d 1385, 7 BABS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BABS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is

entitled to an award of Death Benefits, commencing on November 18, 1999, the date of her husband's death, based upon the Decedent's average weekly wage of $504.25 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from his work-related lung cancer. The Death Certificate certifies as the immediate cause of death bronchoalveolor cell carcinoma and Dr. Cherniack has opined that Decedent's asbestos exposure as a maritime employee was a significant contributory factor to hastening the death of the Decedent on November 18, 1999. (CX 36) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will be been receiving permanent total disability benefits from February 1, 199 until his death on November 18, 1999. Survivors' benefits shall also be paid to the three minor children of Claimant and Decedent for as long as they are eligible therefor.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BABS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BABS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BABS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BABS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BABS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BABS 10 (1988); **Perry v. Carolina Shipping**, 20 BABS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BABS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BABS 267, 270 (1984), **modified on reconsideration**, 17 BABS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BABS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted the entitlement to benefits by the Claimant and the Decedent. **Ramos v. Universal Dredging Corporation**, 15 BABS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BABS 502, 506 (1979).

Responsible Employer

The Employer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BABS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BABS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BABS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BABS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BABS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BABS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914

F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BABS 289 (1989).

As Decedent was exposed to asbestos until his last day of work in September of 1990, as the bond provided by St. Paul expired on June 30, 1987 and as the bond provided by CIGNA has been exhausted, as the Employer is now in Chapter 11 proceedings (TR 22) and may not be able to satisfy its obligations herein, this Administrative Law Judge respectfully requests that the Special Fund pay the benefits awarded herein out of the above-described letter of credit totaling $959,045.13. (TR 21)

Section 33 of the Act

As noted above, Claimant and the Decedent have settled at least four of their so-called third-party suits against the manufacturers and distributors of asbestos products for the net amount of $128,470.95. Accordingly, the Employer, pursuant to Sections 33(b) and (f) of the Act, is entitled to a credit in that amount towards its obligations herein.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's and Director's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after June 9, 1999, the date of referral of this claim. (ALJ EX). Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Commencing on February 1, 1999 and continuing until November 17, 1999, the Employer shall pay to the Claimant, as

representative of Decedent's estate, compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $504.25, such compensation to be computed in accordance with Section 8(a) of the Act.

2. The Employer shall also pay to Decedent's widow, Esther Ohayon ("Claimant"), Death Benefits, and to her and Decedent's dependent children, Mickael (DOB April 9, 1986), Simy (December 3, 1980) and Orly (October 13, 1996), Survivors' Benefits (CX 34), based upon Decedent's average weekly wage of $504.25, pursuant to Section 9 of the Act, and such benefits shall continue for as long as each is eligible therefor.

3. The Employer shall reimburse Claimant reasonable funeral expenses of $3,000.00 (CX 31), pursuant to Section 9(a) of the Act.

4. The Employer is entitled to a credit in the amount of $128,470.95, pursuant to Sections 33(b) and (f) of the Act.

5. Interest shall be paid by the Respondents on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

6. The Respondents shall furnish and/or pay for such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required, between February 1, 1999 and November 18, 1999, subject to the provisions of Section 7 of the Act.

7. If the Employer is unable to fulfill its obligations, for whatever reasons, the benefits awarded herein, including the Claimant's attorney fee, shall be satisfied out of the Letter of Credit which is now in the possession of the Director, OWCP.

8. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Director and the Employer who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after June 9, 1999, the date of referral of this claim to the Office of Administrative Judge.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:las